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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

NUMBER 575

HELEN JACKSON

VS.

LYKES BROS. STEAMSHIP CO., INC.

ON A WRIT OF CERTIORARI TO REVIEW
THE DECISION OF THE SUPREME COURT
OF LOUISIANA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

On January 5, 1965, the widow of the decedent filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking remedy under the Jones Act (46 U.S.C. 688) or in the alternative pursuant to General Maritime Law, praying for a trial by jury. (R-1) In response, the shipowner filed exceptions of no cause of action and no right of action alleging that the Longshoremen's and Harbor Workers' Act provided exclusive remedy, if there was any remedy, for the widow

of the decedent. (R-5) On October 1, 1965, the Civil District Court for the Parish of Orleans, ignoring the holding of Reed vs. Yaka, (1963) 373 US 410, 83 S Ct 1349 and additionally, ignoring the provisions of the Jones Act, maintained the exceptions of the shipowner, dismissing the action of the petitioner. (R-9) On April 4, 1966, the Fourth Circuit Court of Appeal for the State of Louisiana affirmed the decision of the lower court, alleging that the petitioner only had an in rem remedy in a non state forum and had no in personam remedy against the shipowner in any forum. (R-10) On May 2, 1966, an application for a rehearing was refused by the Fourth Circuit Court of Appeals for the State of Louisiana. And on June 21, 1966, the Supreme Court of Louisiana denied an application for a writ of certiorari, finding no error of law in the prior judgment. (R-36)

JURISDICTION

The judgment of the Supreme Court of Louisiana denying a writ of certiorari, or writ of review, to the Court of Appeal, Fourth Circuit of the State of Louisiana, was denied on June 21, 1966, printed in Appendix A of the Petition for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). Certiorari was granted on December 5, 1966, ___ S CT ___.

STATUTES INVOLVED

(1) Sections (33 U.S.C. 902, 903 and

905) of the Longshoremen's and Harbor Workers' Compensation Act.

(2) The Jones Act (46 U. S. C. 688).

(3) The Seventh Amendment of the United States Constitution.

(4) The Warranty of Seaworthiness pursuant to General Maritime Law.

QUESTIONS PRESENTED

(1) Is the right of trial by jury guaranteed by the Jones Act (46 U. S. C. 688) and the Seventh Amendment of the United States Constitution waived in a State Court forum?

(2) Is the holding of Reed v. Yaka (1963) 373 US 410, 83 S CT 1349 applicable to a State Court forum as well as a Federal Court forum?

(3) Can there be in rem liability of a vessel to a seaman/longshoreman when there is no in personam liability of the shipowner/operator of the vessel, for the breach of the warranty of seaworthiness?

STATEMENT

While employed by the shipowner/operator, Lykes Bros. Steamship Co., Inc., as a longshoreman, the decedent, Luther Jackson, was subjected to fumes and vapors of an insecticide that escaped in the hold of a

Lykes owned and operated vessel. The inhalation of the fumes/vapors caused and/or contributed to the death of the longshoreman.

In the instant cause, the decedent, the petitioner and Lykes Bros. Steamship Co., Inc., are all citizens of the State of Louisiana. The principal office of Lykes Bros. Steamship Co., Inc., is at New Orleans, Louisiana. Vessels owned by this shipowner regularly dock, load and unload at New Orleans, Louisiana. Longshoremen, like the decedent, regularly work for the same Lykes Bros. Steamship Co., Inc.

In the instant case, Lykes Bros. Steamship Co., Inc. acted simultaneously as shipowner, ship operator and stevedore.

SUMMARY OF ARGUMENT

(1) The decedent was a seaman within the meaning of the Jones Act (46 U.S.C. 688) or at least pursuant to Reed v. Yaka (1963) 373 US 410, 83 S CT 1349.

(2) Whether or not the decedent's employment came within the scope of the Longshoremen's Act was/is a matter for the U. S. Deputy Commissioner to determine.

(3) A State Court forum, like a Federal Court forum, has no authority to make a prior determination (prior to submission of evidence) as to whether or not a particular employee is or is not

Steamship Co., Inc. is primarily a shipowner and ship operator.

With reference to the employment of the decedent, Luther Jackson, the question arises: Where did the shipowner cease to be a ship operator and where did it commence to be a stevedore? Had not a Summary Judgment been granted and had evidence been submitted at a trial of the merits the petitioner would have urged the jury to decide that at all times the shipowner acted as a ship operator, in line with its principal purpose, and not as a stevedore, with reference to its employment of the decedent.

In prior briefs the respondent, Lykes Bros. Steamship Co., Inc., has relied heavily on the case of South Chicago Coal & Dock Co. v. Bassett (1940) 309 US 251, 60 S Ct 544 as authority that Luther Jackson, could not be a member of the crew. However, petitioner urges that in the "Bassett" case the Supreme Court specifically recognized that whether or not an employee was or was not a member of the crew turned on a question of fact. In this "Bassett" case there had been a finding of fact by the U. S. Deputy Commissioner. In the instant case of Luther Jackson there has been no finding of fact by either the U. S. Deputy Commissioner or the jury. In spite of a summary judgment against the petitioner it is purely moot as to whether or not the decedent was or was not a member of the crew.

Notwithstanding that the petitioner

waters, when he was overcome by noxious fumes and/or oxygen deficient air. (R-1) Thus the decedent was at least a Sieracki type seaman. See Seas Shipping Co. v. Sieracki (1946) 328 US 85, 66 S CT 872. Also see International Stevedore Co. v. Haverty (1926) 272 US 50, 47 S Ct 19. In addition to the employee/employer relationship of the decedent, to Lykes Bros. Steamship Co., Inc., this same shipowner acted simultaneously as the operator and stevedore of the vessel to which the decedent was assigned to work. (R-1) Thus, the decedent meets the test of being a Yaka type seaman. See Reed v. Yaka, supra. Lykes Bros. employed the decedent direct. There was no intermediate, shoreside independent stevedore, as in Swanson v. Marra Bros., Inc., (1946) 328 US 1, 66 S Ct 869. Comparing Swanson v. Marra Bros., Inc., supra, to the instant case there are these distinguishing features:

(a) Marra Bros., Inc. was not a ship operator or shipowner;

(b) Swanson's accident took place on the pier, not aboard a vessel;

(c) Swanson sought and received compensation pursuant to the State compensation act; while in the instant case state compensation benefits were denied;

(d) Marra Bros. Inc. were primarily stevedores, while Lykes Bros.

Steamship Co., Inc. is primarily a shipowner and ship operator.

With reference to the employment of the decedent, Luther Jackson, the question arises: Where did the shipowner cease to be a ship operator and where did it commence to be a stevedore? Had not a Summary Judgment been granted and had evidence been submitted at a trial of the merits the petitioner would have urged the jury to decide that at all times the shipowner acted as a ship operator, in line with its principal purpose, and not as a stevedore, with reference to its employment of the decedent.

In prior briefs the respondent, Lykes Bros. Steamship Co., Inc., has relied heavily on the case of South Chicago Coal & Dock Co. v. Bassett (1940) 309 US 251, 60 S Ct 544 as authority that Luther Jackson, could not be a member of the crew. However, petitioner urges that in the "Bassett" case the Supreme Court specifically recognized that whether or not an employee was or was not a member of the crew turned on a question of fact. In this "Bassett" case there had been a finding of fact by the U. S. Deputy Commissioner. In the instant case of Luther Jackson there has been no finding of fact by either the U. S. Deputy Commissioner or the jury. In spite of a summary judgment against the petitioner it is purely moot as to whether or not the decedent was or was not a member of the crew.

Notwithstanding that the petitioner

urges that her decedent husband was a member of the crew, entitling her to seek remedy pursuant to the Jones Act, she has an alternative plea that at least her husband was a vicarious seaman, of the Yaka type, entitling her to seek remedy against the shipowner for the breach of warranty of seaworthiness. See Reed v. Yaka, (1963) 373 US 410, 83 S Ct 1349; Biggs v. Norfolk Dredging Company, 360 F 2d 360 (4 CA, 1966); Pacific Inland Navigation Company v. Course, Appeal No. 21,080, decided October 26, 1966, U. S. Court of Appeals for 9th Circuit, ____F 2d____.

2.

WHETHER OR NOT THE DECEDENT'S EMPLOYMENT CAME WITHIN THE SCOPE OF THE LONGSHOREMEN'S ACT WAS/IS A MATTER FOR THE U. S. DEPUTY COMMISSIONER TO DETERMINE.

Unlike the harbor worker in Desper v. Starved Rock Ferry Company, (1952) 342 US 187, 72 S Ct 216, the employment status of Luther Jackson, coming within the provisions of the federal act, has never been determined. No formal claim has ever been presented to the U. S. Deputy Commissioner. Accordingly, there is no presumption that the claim of the petitioner comes within the provisions of this federal act. (33 USC 920) Moreover, it is within the exclusive province of the U. S. Deputy Commissioner to make a determination as to whether or not the claim

of the petitioner comes within the provisions of this federal act. (33 USC 919) And only after such an agency determination has been made, and then only in the course of an appellate review can a United States Federal District Court review that prior determination of the U. S. Deputy Commissioner. (33 USC 921) Since no claim has been presented to the U. S. Deputy Commissioner and since the U: S. Deputy Commissioner has not made a determination as to the employment status of the decedent, the State Court forums below, as herein complained, were without any judicial authority to determine, or ascertain that the employment of the decedent came within the scope of the federal act. Whether or not the decedent was an employee within the meaning of the federal compensation act is a determination solely to be made by the U. S. Deputy Commissioner. Since the U. S. Deputy Commissioner has made no prior determination that issue is moot.. See Desper v. Starved Rock Ferry Company, supra. In the absence of any determination by the U. S. Deputy Commissioner for the Department of Labor to the effect that the employment of Luther Jackson came within the scope of the federal act the State District and Appellate forums were in error to substitute their own determination that the decedent's employment came within the exclusive scope of that federal act.

A STATE COURT FORUM, LIKE A FEDERAL COURT FORUM, HAS NO AUTHORITY TO MAKE A PRIOR DETERMINATION (PRIOR TO SUBMISSION OF EVIDENCE) AS TO WHETHER OR NOT A PARTICULAR EMPLOYEE IS OR IS NOT A MEMBER OF THE CREW.

The Court below ignored the law as persistently stated by the United States Supreme Court to the effect that whether or not an employee is a member of the crew, entitled to remedy under the Jones Act, is a question of fact to be tried by the jury. Had the U. S. Deputy Commissioner made a determination to the effect that the employment of the decedent was within the scope of the federal compensation act, then this would have represented a conclusive presumption. See Desper v. Starved Rock Ferry Company, (1952) 342 US 187, 72 S Ct. 216. And when a case is to be tried by a jury, as the instant case, it is a question of fact for the jury to determine. The determination of whether the decedent was a seaman should not be taken from the jury by the trial judge if there is any evidentiary basis for the jury to determine. Grimes v. Raymond Concrete Pile Company, (1957) 356 US 252, 78 S Ct. 687. Gianfala v. Texas Co., 350 US 879 (1955); Senko v. LaCrosse Dredging Corp., 352 US 370 (1957) rehearing denied, 353 US 931 (1957); Braniff v. Jackson Ave. Gretna Ferry, Inc., 280 F 2d 523, (CA 5th, 1960); Offshore Company v. Robinson, 266 F 2d 769 (CA 5th, 1959); Butler v. Whiteman, (1957)

356 US 271, 78 S Ct. 734; McKie v. Diamond Marine Co., 204 F 2d 132 (CA 5th 1953).

WHETHER OR NOT THE DECEDENT WAS A MEMBER OF THE CREW, ENTITLING HIS WIDOW TO REMEDY PURSUANT TO THE JONES ACT, HE WAS, NEVERTHELESS A SEAMAN, PURSUANT TO REED V. YAKA, SUPRA, ENTITLING HIS WIDOW TO REMEDY PURSUANT TO GENERAL MARITIME LAW, AS SUPPLEMENTED BY THE LOUISIANA WRONGFUL DEATH STATUTE (LSA-CC 2315)

Whether or not the decedent was a member of the crew, he was at the very least, a Yaka type seaman. Pursuant to Reed v. Yaka, supra, as supplemented and enabled by the Louisiana Wrongful Death Statute (LSA-CC 2315) give the petitioner a right of action and cause of action to seek remedy for the death of her husband. The applicable parts of LSA-CC 2315 read as follows:

> "Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> "The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs,

subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; . . . The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. . ."

The petitioner submits that the Jones Act, 46 USC 688, as supplemented by the Federal Employee's Liability Act (FELA), 45 USC 51-59, affords the petitioner a right of action for the death of her husband. Assuming that the petitioner is denied a right of action under the Jones Act, she still has a right of action under General Maritime Law, enabled by the Louisiana Civil Code Article, 2315. See Tungus v. Skovgaard, (1959) 358 US 588, 79 S Ct 503; also see United N. Y. and N. J. Sandy Hook Pilots Assn. v. Halecki, (1959) 358 US 613, 79 S Ct 517; Hess v. United States, (1960) 361 US 314, 80 S Ct 341, and Goett v. Union Carbide Corp., (1960) 361 US 340, 80 S Ct 357.

THE INJURIES SUSTAINED BY THE DECEDENT DOES NOT PRESENT AN ISSUE COMING WITHIN THE SCOPE OF THE "TWILIGHT DOCTRINE"

In deciding the instant case, as well as Robinson v. Lykes Bros. Steamship Co., Inc., 170 So 2d 243 (La App 1964); cert. den. (1965) 247 La 481, 172 So 2d 292, the district, appellate and highest court of Louisiana relied heavily on the decision in Stepter v T. Smith & Son, Inc., (1961) 241 La 465, 129 So 2d 740 and Ellis v. Travelers Ins. Co., (1961) 241 La. 433, 129 So 2d 729, both of which involved longshoremen suing non shipowner employers for benefits under the Louisiana Workmen's Compensation Act. However, the issues as presented in Ellis and Stepter are grossly distinguishable in the following:

(a) Ellis and Stepter were longshoremen suing stevedore employers, then for state compensation benefits;

(b) No owner or operator of a vessel was involved in the suit;

(c) No issue of the warranty of seaworthiness or the Jones Act was involved in the remedy sought by Ellis and Stepter;

(d) The claims for state compensation benefits by Ellis and Stepter come subsequent to a federal award and subsequent to payment of federal benefits.

It is submitted that the aforementioned Stepter and Ellis cases have a rightful place in the history of the "twilight doctrine" with such cases as Southern Pacific Co. v. Jensen, (1917) 244 US 205, 37 S Ct 524 and Davis v. Department of Labor, (1942) 317 US 249, 63 S Ct 225, but have no bearing on the instant case with reference to the petitioner. Parenthetically, if these courts were to decide the instant case by reference to those cases coming within the scope of what is known as the "twilight zone," then it is submitted that the courts of the State of Louisiana should have, at least, referred to Calbeck v. Travelers Ins. Co., (1962) 370 US 114, 82 S Ct 1196. Perhaps the holding of "Calbeck" does not apply properly herein, in the same manner that "Jensen" and "Davis" do not apply, but it is submitted, that at least the spirit of "Calbeck" should apply to help understand that Longshoremen's and Harbor Workers' Compensation Act of 1927 was enacted to enlarge and/or ensure remedy for maritime employees, and not to restrict them. And, of course, this same spirit of enlargement, not restriction, pervades in Reed v. Yaka, (1963) 373 US 410, 83 S Ct 1349.

It is submitted by the petitioner there is nothing in Stepter, Ellis, Jensen, or Davis

that would serve as authority to restrict or inhibit the rights of the petitioner to seek remedy under Jones Act and/or under General Maritime Law, pursuant to Reed v. Yaka, supra.

6.

THE HOLDING OF REED V. YAKA, SUPRA, APPLIES EQUALLY TO A STATE COURT FORUM AS WELL AS A FEDERAL COURT FORUM.

In deciding the instant case against Helen Jackson, the Court of Appeals, Fourth Circuit for the State of Louisiana, assumed that the answer to all questions posed by the petitioner was found in the exclusive clause of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 905). See R-11, bottom, continued R-12. Then similar to its opinion in Robinson v. Lykes Bros. Steamship Co., Inc., 170 So 2d 243 (La App 1964) cert. den. La S Ct (1965), the same appellate court reasoned that the petitioner, herein, was not afforded any in personam right of action against the shipowner:

> "An analysis of the Yaka case reveals language which suggests that an in personam remedy may be available; the analysis likewise reveals that there exists reason believing that the section of the Longshoremen's and Harbor Workers' Act referred to herein-

above has been taken upon the judicial anvil and hammered into an unexpected shape." (R-14)

Yet, in spite of Reed v. Yaka, supra, the court denied the petitioner remedy, and further concluded:

> "In any event, we are of the opinion it exemplifies more judicial integrity to conclude that the rationale emanating from Yaka merely permits a longshoreman to bring action in rem against his employer in federal court." (R-14/15)

In arriving at decisions in both Robinson and the instant case the appellate court of Louisiana took a narrow and restrictive view of 33 USC 905, contrary and in spite of Reed v. Yaka, supra.

Lykes Bros. Steamship Co., Inc., acting simultaneously as a ship operator and stevedore, is typically represented in Reed v. Yaka, supra, and for the Louisiana courts to hold that the petitioner had no in personam remedy against this shipowner, in effect, emasculated the entire spirit of Reed v. Yaka. Thus, if the holdings in Robinson and Jackson by the Louisiana courts are correct, then the case of Reed v. Yaka must be rewritten so as to hold:

(a) the obligation of maintaining

a seaworthy vessel is delegable;

(b) the shipowner can shift its obligation by selective use of contracts;

(c) only blind adherence to the superficial or literal meaning of a statute (i.e., 33 USC 905) will satisfy the law;

(d) the humanitarian policy of the doctrine of seaworthiness is a sometimes doctrine;

(e) the obligation of seaworthiness can be limited, evaded and/or escaped by choosing the proper type of employment contracts;

(f) or, in the alternative, if any of the foregoing are not true in federal courts, then they are always true in state courts.

Of course, in Reed v. Yaka it has been explicitedly stated, the prior existence or prior availability of payment of compensation to a maritime worker did not bar his right to seek his traditional maritime rights.

"The only question," said the Court,

"is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's (the charterer's) breach of its warranty of seaworthiness." 373 US at 413, 83 S Ct 1352.

Further, 373 US at 413, 83 S Ct 1352:

"In Seas Shipping Co. v. Sieracki, 328 US 85, we held that a shipowner's warranty of seaworthiness extended to a longshoreman injured while loading the ship, even though the longshoreman was employed by an independent contractor. In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness, which we held not to depend upon any kind of contract. 328 US at 93-95. We further held that the Longshoremen's and Harbor Workers' Act was not intended to take away from Longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation."

Again, 373 US at 415, 83 S Ct 1354:

"In the light of this whole body of

law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid."

The petitioner urges her decedent husband should have the status of Sieracki and Yaka with reference to the nondelegable obligation of seaworthiness which Lykes Bros. Steamship Company, Inc. should not be permitted to avoid. See Biggs v. Norfolk Dredging Company, 360 F 2d 360 (CA 4th, 1966); Pacific Inland Navigation Company v. Course, Appeal No. 21,080, decided October 26, 1966, U. S. Court of Appeals for 9th Circuit, F 2d.

7.

THERE CAN BE NO IN REM LIABILITY OF A VESSEL UNLESS THERE IS CORRESPONDING IN PERSONAM LIABILITY OF THE SHIPOWNER/OPERATOR.

To effect a dismissal of the petitioner's cause the defendant shipowner has had to urge the priority of an in rem action over in personam.

This is humorous. A shipowner stands to lose $5,000.00 for each day a vessel is under seizure, yet the shipowner, herein, is in effect urging litigants to seize vessels in order to litigate. Thus, caught in the web of its own defense, the shipowner is advocating a legal fiction it most abhors.

Parenthetically, the petitioner would urge there can be no in rem liability unless there is corresponding or underlying personal liability. Liability grows out of the use, operation and/or ownership of a thing, but the thing cannot use, operate or own itself, or another thing. See City of Norwich (1885) 118 US 468, 6 S Ct 1150; Continental Grain Co. v. Barge FBL-585 (1959) 364 US 19, 80 S Ct 1470. In Continental Grain Co. v. Barge FBL-585, 364 US 23, the court said:

> "...A purpose of the fiction among others, has been to allow action against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still...A fiction born to provide a convenient forum should be transferred into a weapon to defeat that very purpose."

And in the City of Norwich, 118 US 503 the Court said:

> "...To say that an owner is not liable, but that his vessel is liable, seems to us like talking

in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability a man and his property cannot be separated."

However, the petitioner urges the question of whether or not a vessel, itself, may be solely liable is not an issue before this Court. If the exclusive clause (33 US 905) is not to be narrowly and restrictively interpreted, then there is personal liability for the employer of the longshoreman as the Court stated in Reed v. Yaka, 373 US 412:

"We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view the Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury."

Jackson's employee/employer relationship to Lykes was all and more than Reed's relationship to Pan-Atlantic. And while Pan-Atlantic's relationship to the vessel was that only of a demisee Lykes is that of an owner and operator.

It is submitted by the petitioner that if

Pan-Atlantic (in Yaka) was personally liable as a demisee and non owner, then Lykes Bros. has to be personally liable as both owner and operator of the vessel.

CONCLUSION

In conclusion the petitioner urges and prays that the United States Supreme Court will remand this matter to the Supreme Court of Louisiana with instructions for the Supreme Court of Louisiana to direct the Civil District Court for the Parish of Orleans to reverse its judgment dismissing the petitioner's suit for no right of action and no cause of action and to order the Civil District Court for the Parish of Orleans to allow this case to be tried on the merits and the petitioner prays for such other relief as the nature of the case and equity shall require.

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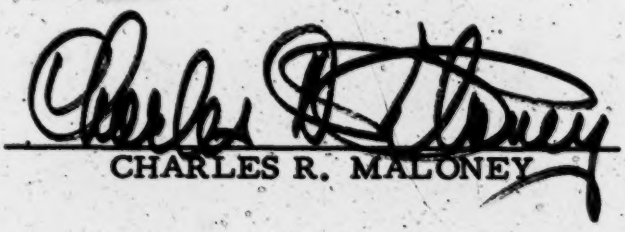
PROOF OF SERVICE

I, CHARLES R. MALONEY, attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing Brief on Mr. G. Edward Merritt, of Messrs. Terriberry, Rault, Carroll, Yancey & Farrell, by mailing a copy thereof, postage prepaid, addressed to their office at 2141 International Trade Mart Building, 2 Canal Street, New Orleans, Louisiana 70130.

Dated this 11 day of February, 1967.



CHARLES R. MALONEY